

**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT
OF ALABAMA, SOUTHERN DIVISION**

KELLEY FOODS OF ALABAMA, INC.,)
)
Plaintiff,)
) CIVIL ACTION NO.
v.) 1:04 - cv-01246-MHT-DRB
)
MYERS NISSI & COMPANY, INC.; a)
corporation d/b/a VERTICALSOFT,)
)
Defendant.)

**MOTION IN LIMINE ON BEHALF OF MYERS NISSI & COMPANY, INC.
TO PROHIBIT PLAINTIFF FROM INTRODUCING ANY EVIDENCE OR
TESTIMONY REGARDING ALLEGED IMPLIED WARRANTIES INCLUDING
WARRANTIES OF MERCHANTABILITY
OR FITNESS FOR A PARTICULAR PURPOSE**

COMES NOW Defendant, MYERS NISSI & COMPANY, INC. ("MYERS NISSI"), and moves the Court for an Order prohibiting plaintiff in this matter from introducing any evidence or testimony regarding:

- a) an alleged implied warranty of merchantability;
- b) an alleged implied warranty of fitness for a particular purpose; or
- c) any other alleged "implied warranty."

In support of this motion, Myers Nissi states:

- 1) Prior to consummation of the agreement between the parties, Plaintiff was provided a document entitled "Limited Warranty", which set out the "exclusive remedies" available to Plaintiff in the event of any breach of the warranties contained in said document. A true and correct copy of said "Limited Warranty" is attached as Exhibit 1.
- 2) Plaintiff, through its president, signed the "Limited Warranty," acknowledging that he had read, understood, and accepted the terms of said warranty. *Brunswick Corp. v. Sittason*, 167

So.2d 126, 140 (Ala. 1964).

- 3) the Limited Warranty in this matter contains express language which states that the agreement between the parties shall “specifically exclude any implied warranties of merchantability and fitness for a particular purpose.” *See Exhibit 1.* The Limited Warranty further states that “[n]o other warranties are expressed and none shall be implied.” *Id.*
- 4) under Alabama law, parties to a commercial contract such as the one at issue may validly agree to limit the warranty between the parties. Ala. Code §§ 7-2-316; 7-2-719; *Moorer v. Hartz Seed Co.*, 120 F.Supp.2d 1283, 1290 (M.D. Ala. 2000).
- 5) because the signed agreement between the parties validly and expressly disclaims the provision of any implied warranty of merchantability, any warranty of fitness for a particular purpose, or any other implied warranty, Plaintiff should be precluded from introducing any evidence or testimony regarding any such alleged implied warranties in this matter.
- 6) Myers Nissi incorporates fully by reference its brief in support of this motion, filed contemporaneously herewith.

WHEREFORE, defendant, MYERS NISSI & COMPANY, INC., moves this Honorable Court for an Order precluding the plaintiffs from introducing any testimony regarding:

- a) an alleged implied warranty of merchantability;
- b) an alleged implied warranty of fitness for a particular purpose; or

c) any other alleged "implied warranty."

Respectfully submitted,
Spyridon, Palermo & Dornan, LLC
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s/John M. Herke
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Attorneys for Defendant,
MYERS NISSI & COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this case.

s/John M. Herke
JOHN M. HERKE